No. 18,712

United States Court of Appeals

For the Ninth Circuit

ROBERT SING CHOW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

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JURISDICTION

The jurisdiction of the District Court and of this Court has been properly invoked under the applicable statutes.

STATEMENT OF THE CASE

Appellant arrived at San Francisco, California, on August 23, 1950, on board the SS "President Wilson", and applied for admission to the United States under the name of Chow Sing, as a citizen. The claim to citizenship was founded upon Revised Statutes § 1993. Chow Sing claimed to be the natural son of Chow Yit Quong, who was alleged to be an American citizen. He was denied admission to the United States on said claim of citizenship by the Immigration and Naturali-

zation Service. An appeal to the Board of Immigration Appeals followed, the Board affirmed the decision denying admission.[1]

Following the action of the Board of Immigration Appeals affirming the decision of the Board of Special Inquiry, denying his claim to admission to the United States as a United States citizen, appellant filed a petition for declaratory judgment of United States citizenship under the provisions of § 503 of the Nationality Act of 1940 (8 U.S.C. 903), in the United States District Court for the Northern District of California. After trial, an adverse judgment was entered on February 19, 1953. Appellant appealed to this Court, and on August 18, 1954, a *per curiam* opinion was filed affirming the judgment of the District Court. On November 24, 1954, an opinion written by Judge Mathews of this Court was substituted for the *per curiam* opinion filed on August 18th. In this opinion, the Court specifically held that the finding of the District Court that "The person [Sing] who claims to be plaintiff Chow Sing has failed to introduce evidence

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[1]The petition of the appellant herein for naturalization was filed under the name of Robert Sing Chow, on January 5, 1962. On or about October 11, 1963, the alleged father of appellant, Chow Yit Quong, under oath admitted that his true name is Kwong Gum Wah; that he was born in Chung Shan District, China, on March 14, 1898, and was admitted to the United States as a citizen under the name of Chow Yit Quong on June 30, 1923, as the son of a United States citizen; that in fact his true father was Kwong Jung; that in truth and fact his true father was not a citizen of the United States, and was never in the United States; and that he, Kwong Gum Wah, is a citizen of China and not of the United States; that his son, the appellant herein, Kwong Chow Sing, was born in Canton City, China, on August 23, 1934.

of sufficient clarity to satisfy or convince this Court that Chow Yit Quong is the natural blood father of the person known as Chow Sing, or that the person [Sing] who appeared before the Court claiming to be plaintiff Chow Sing is in truth and fact Chow Sing.", was not clearly erroneous.

A petition for rehearing was thereafter filed, relying upon the decision of this Court in *Ly Shew v. Dulles,* 219 F.2d 413. By Order dated January 17, 1955, the November 24, 1954 opinion was amended; the judgment of the District Court was vacated, and the cause was remanded with directions to make findings as to whether Chow Yit Quong was "Sing's father, in the light of the opinion. This remand was founded on the proposition that the District Court had proceeded on the theory that the burden of proof resting on Sing was different from and heavier than the ordinary burden of proof resting on plaintiffs in civil actions. Upon the remand, the District Court, after further proceedings in accordance therewith, on April 1, 1955 again denied to appellant the relief prayed for in the petition for declaratory judgment. This judgment was also appealed, and on June 25, 1956 this Court filed its opinion holding that Chow Sing had not carried his burden of proof, and affirmed the judgment of the District Court. Appellant did not seek certiorari in the Supreme Court, so the decision of the Board of Special Inquiry denying admission to the United States was final.

As recited in appellant's brief, the appellant was inducted into the United States Army and served

honorably in an active-duty status from August 1, 1957 to July 31, 1959, at which time he was transferred to the Army Reserves. The petition for naturalization filed in the District Court was denied on the ground that appellant failed to establish lawful admission to the United States for permanent residence.

QUESTION PRESENTED

The question presented is: Must appellant establish that he was lawfully admitted to the United States for permanent residence under Section 328 of the Immigration and Nationality Act of 1952?

SUMMARY OF THE ARGUMENT

It is appellee's contention that to be accorded the benefits of § 328 (naturalization through service in the armed forces of the United States) the petitioner must have been lawfully admitted to the United States for permanent residence.

ARGUMENT

Section 328(a) (8 U.S.C. 1439) provides that

> "a person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating three years, and who, if separated from such service, was never separated except under honorable conditions, may

be naturalized without having resided continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified period".

This portion of the section eliminates the necessity of

"having resided continuously * * * in the United States for at least five years, and in the State * * * for at least six months * * * and without having been physically present in the United States * * * if such petition is filed while the petitioner is still in the service or within six months after the termination of such service".

Section 328(b) provides:

"A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this title * * *",

with exceptions not pertinent to the argument.

Subdivision (d) of said section provides:

"The petitioner shall comply with the requirements of section 316(a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization * * *".

Section 316(a) provides:

"No person, except as otherwise provided in this title, shall be naturalized unless such peti-

> tioner (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being *lawfully admitted for permanent residence,* within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character * * *". [Emphasis supplied.]

Subsection (a) of § 316 contains three separate parts. (1) continuous residence after being lawfully admitted for permanent residence within the United States for five years, and within the State for at least six months, having been physically present therein for at least half of that time; (2) continuous residence from the date of the petition to the time of admission; and (3) during all the period has been and still is a person of good moral character. Subdivision (a) of § 328 specifically eliminates the residence and physical presence requirements, if the petition is filed while the petitioner is still in the service, or within six months after the termination of such service. In no wise has the requirement "after having been lawfully admitted for permanent residence" been eliminated or excused.

Section 318 provides:

> "Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act."

The decisions that have considered Section 328 have all stated that Section 328 requires the alien to have been admitted to this country for permanent residence. *United States v. Rosner,* 249 F.2d 49, involved a question as to whether or not under § 328(a) the words

> "served honorably at any time in the armed forces of the United States for a period or periods aggregating three years",

were to be construed as requiring the individual to have "active duty status" or whether or not service in the Army Reserve could be included in determining the period of service. The Court of Appeals for the First Circuit compared § 328 with § 329 (8 U.S.C. 1440) and held that the Congress having specified in § 329 that

> "any person who while an alien or non-citizen national of the United States has served honorably in an *active duty status* * * *, as compared with the requirements of §328(a) 'a person who has *served honorably* at any time in the armed forces' meant that the words 'served honorably' did not require such service to be in an active duty status."

The Court said, at page 51,

> "It seems likely that Congress, if it had meant the words 'served honorably' in Sec. 328 to require such service to be in an active duty status, would have inserted that requirement specifically in Sec. 328 as it has done in Sec. 329."

The Court went on further to say, on the same page,

> "Title 8 U.S.C.A. § 1440a allowed aliens coming under its provisions to be naturalized even though they were not admitted for permanent residence, providing they had been lawfully admitted and had been physically present within the United States for a single period of at least one year at the time of entering the armed forces. It would not be illogical to content that Congress intended to require higher standards of military service in Sec. 329 and 8 U.S.C.A. § 1440a in return for allowing aliens who had not been lawfully admitted to the United States for permanent residence the advantage of practically immediate citizenship under the provisions of Sec. 329 and only a one year period of residence under 8 U.S.C.A. § 1440a.
>
> Sec. 328, on the other hand, requires the alien to have been admitted to this country for permanent residence. It further requires a period of three years in military service, unlike Sec. 329, which sets no minimum length on the period of time served during World War I or World War II and 8 U.S.C.A. § 1440a, which requires a period of ninety days in active military service."

The Court of Appeals for the Seventh Circuit in *United States v. Aronovici,* 289 F.2d 559, found itself

in agreement with the First Circuit in *United States v. Rosner,* supra, and quoted from said decision

> "Sec. 328, on the other hand, requires the alien to have been admitted to this country for permanent residence." (Page 561.)

The Court of Appeals for the Second Circuit, in *Papathanasiou v United States,* 289 F.2d 930, in a *Per Curiam* Order affirming the District Court, cited *United States v. Rosner,* 1 Cir., supra,

The Supreme Court of the United States, in *Tak Shan Fong v. United States,* 359 U.S. 102, 3 L.ed. 662, 79 S.Ct. 637, in considering a question concerning the commencement of presence in the country, where it appeared that a lawful entry had preceded a subsequent illegal entry, held the lawful entry preceding the subsequent illegal entry was irrelevant. Beginning on page 103, the Court said:

> "Congress has shown varying decrees of liberality in granting special naturalization rights to aliens serving in our armed forces at various times. For example, the Immigration and Nationality Act of 1952 allows such rights to those having served honorably in World War I or during the period September 1, 1939 to December 31, 1946, if at the time of their induction or enlistment they simply were physically present in the United States or certain named outlying territories (8 U.S.C. § 1440). On the other hand, that Act's general provision allowing aliens with three years' armed service at any time to be naturalized free of certain residence requirements (8 U.S.C. § 1439) provides no exemption from the requirement that they have been 'law-

> fully admitted to the United States for permanent residence' (§ 318, 8 U.S.C. § 1429.)"

Judge Carter, District Judge of the United States District Court for the Northern Division of California, in the *Petition for Naturalization of Pedro Velasco Fernandez,* 196 Fed. Supp. 107, in his opinion denying the petitioner's application for naturalization, on page 108 stated:

> "The Naturalization Examiner correctly states that Sections 328 and 329 of the Immigration and Nationality Act of 1952, 66 Stat. 249, 8 U.S.C.A. §§ 1439 and 1440 do not apply. Section 328 requires that the alien must have been lawfully admitted for permanent residence. Section 329 applies only to service in World War I or during a period beginning September 1, 1939 and ending December 31, 1946."

Appellant, in the Argument of his brief, has designated four "points". Point 1 submits the proposition that petitioner, having filed his petition when still in the service or within six months thereafter, under § 328(d) does not have to comply with any of the requirements of § 316(a), including the requirement "after being lawfully admitted for permanent residence". It is the view of the appellee that § 328(a) has specifically eliminated the portion of § 316(a) with which the petitioner does not have to comply if the petitioner has filed the petition while still in the service or within six months after termination, and that said subdivision has not eliminated the requirements of lawful admission for permanent resi-

dence; furthermore, that subdivision(b) of § 328 provides for compliance in all other respects with the requirement of the Title; and § 318 specifically states that except as otherwise provided in the Title, no person shall be naturalized unless he has been lawfully admitted. Nowhere in the Title has this requirement been "otherwise provided".

Point 2 of appellant's Argument is that in the lower court the Immigration and Naturalization Service by inference conceded that appellant is exempt from the provisions of § 316(a). It is not clear from appellant's Argument on this point just how this inference is drawn. Appellee does not concede such an inference. The specific reason for the recommendation of the naturalization examiners that the petition be denied was that appellant had not been lawfully admitted for permanent residence.

Point 3 of appellant's Argument is considered to be wholly irrelevant, as to whether or not the Immigration and Naturalization Service would have interposed any objection to the naturalization of appellant if his application were being considered under the provisions of § 324 of the 1940 Nationality Act. The specific point here is that [under the provisions of the 1952 Act] the Immigration and Naturalization Service did interpose objection to the granting of the naturalization petition under the provisions of § 328, on the grounds that appellant was not lawfully admitted for permanent residence.

Point 4 of the appellant's Argument is also concerned with the provisions of § 324 of the Nationality

Act of 1940. Appellant deemed it advisable to discuss certain portions of the legislative history relating to the section. With regard to the legislative history, reference is again made to the Supreme Court's decision in *Tak Shan Fong v. United States,* supra, beginning on page 104:

> "As distinguished from its policy toward World War I and II service, Congress was not prepared to allow special naturalization rights to aliens serving at the time of Korea simply if they entered the service while physically, for any length of time and lawfully or unlawfully, within the United States. Nor was it prepared to make one year's residence alone the condition; it also imposed the requirement of lawful admittance. It would not be a meaningful requirement to attribute to Congress if it could have been satisfied by a lawful entry, followed by departure, before and unconnected with the commencement of the year's presence. We believe that Congress must have been referring to the last entry before the year's presence—the entry into the country which provided the occasion for that presence. Cf. *Bonetti v. Rogers,* 356 U.S. 691. Under this construction, clause (2) of the statute requires a 'single period' of residence commencing with lawful admission and continuing for a year thereafter. It does not demand that the alien's continuing status in the country be lawful, but it does make that requirement of the entry which gives rise to his presence.
>
> "Such legislative history as is relevant to the meaning of the statute bears out this construction. The Act was passed in the First Session of the Eighty-third Congress, and when the bill that

became the Act was first brought to the House floor after Committee consideration during that Session, the member reporting it stated that it was identified with the law that existed during 'the war' (presumably World War II) with the exception that it applied only to aliens who were 'legally and lawfully in the United States'. 99 Cong Rec 2639. This must be read in the context of the House Committee Report's statement that 'lawful admission' was a prerequisite to the bill's benefits, and its explanation that it had rejected a proposal of the Justice Department that would have required the presence of the alien at the time of entrance into the armed services also be lawful. The Committee had felt that the alien should not be saddled with 'the technicalities involved in connection with the continuance of such [lawful] status at the time of entering the Armed Forces'. HR Rep No. 223, 83d Cong. 1st Sess, p. 4. The House bill required only lawful admission and physical presence at the time of entering the service; later the Senate inserted the one year's presence requirement, but we do not perceive any change in the distinction we have set forth above. To us, this indicates that Congress desired that the alien's presence in the country be the consequence of a lawful admission, even though the continuance of his stay be beyond the terms on which he was admitted.''

Assuming appellant's contention that Congress intended to carry forward the basic principles of Section 324, the principles involved are those related to residence as embodied in Section 328. There is no

basis for a conclusion that lawful admission for permanent residence is other than a specific requirement.

CONCLUSION

It is respectfully submitted that the District Court did not err in denying appellant's petition for naturalization on the grounds that he had not been lawfully admitted for permanent residence; and the judgment of said Court should be affirmed.

Dated, San Francisco, California,
January 4, 1964.

CECIL F. POOLE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorney for Appellee.

(Appendix Follows)

Appendix.

Appendix

Section 316, Immigration and Nationality Act of 1952 (8 U.S.C. 1427):

Subdivision (a):

"No person except as otherwise provided in this title, shall be naturalized unless such petitioner (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

Section 318, Immigration and Nationality Act of 1952 (8 U.S.C. 1429):

"Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions

of this Act. The burden of proof shall be upon such person to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting each proof he shall be entitled to the production of his immigrant visa, if any, or of other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry, in the custody of the Service. Notwithstanding the provisions of section 405 (b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act: *Provided,* That the findings of the Attorney General in terminating deportation proceedings or in suspending the deportation of an alien pursuant to the provisions of this Act, shall not be deemed binding in any way upon the naturalization court with respect to the question of whether such person has established his eligibility for naturalization as required by this title."

Section 328, Immigration and Nationality Act of 1952 (8 U.S.C. 1439):

"(a) A person who has served honorably at any time in the Armed Forces of the United States for a

period or periods aggregating three years, and who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified period, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service.

"(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this title, except that—

(1) no residence within the jurisdiction of the court shall be required;

(2) notwithstanding section 336(c), such petitioner may be naturalized immediately if the petitioner be then actually in the Armed Forces of the United States, and if prior to the filing of the petition, the petitioner and the witnesses shall have appeared before and been examined by a representative of the Service;

(3) the petitioner shall furnish to the Attorney General, prior to the final hearing upon his petition, a certified statement from the proper executive department for each period of his service upon which he relies for the benefits of this section, clearly showing that such service was

honorable and that no discharges from service, including periods of service not relied upon by him for the benefits of this section, were other than honorable. The certificate or certificates herein provided for shall be conclusive evidence of such service and discharge.

(c) In the case such petitioner's service was not continuous, the petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing such petition between the periods of petitioner's service in the Armed Forces, shall be alleged in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon. Such allegation and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization.

(d) The petitioner shall comply with the requirements of section 316(a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service within five years immediately preceding the date of filing such petition shall be considered as residence and physical presence within the United States.

(e) Any such period or periods of service under honorable conditions, and good moral character, at-

tachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service, and such authenticated copies of records shall be accepted in lieu of compliance with the provisions of section 316(a).

Section 329, Immigration and Nationality Act of 1952 (8 U.S.C. 1440):

"(a) Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall deter-

mine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: *Provided, however,* That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purpose of this section. No period of service in the Armed Forces shall be made the basis of a petition for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.